

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

11/02/85
30514

FILE: B-216264; B-216621;
B-216622; B-216701

DATE: February 25, 1985

MATTER OF: Dictaphone Corporation

DIGEST:

1. Protests asserting that an agency acted improperly in requesting and obtaining waivers from use of the protester's mandatory single-award Federal Supply Schedule (FSS) contract for portable desk top recorders and transcribers are denied, since the protester's items are not compatible with the central dictation system being acquired from another vendor, and the Federal Acquisition Regulation specifically provides that a mandatory-user agency may request waivers from use of an FSS contract when the items on that contract will not meet its minimum needs.
2. The internal policy decisions of contracting agencies and the underlying reasons for them are generally not subject to review under GAO's bid protest function, which rather addresses whether specific procurement actions have complied with statutory, regulatory, and other legal requirements.

Dictaphone Corporation protests the issuance of purchase orders to Lanier Business Products, Inc., under four separate requests for quotations (RFQs) issued by the Veterans Administration (VA). The procurements were for the acquisition of complete central dictation systems, including accessory portable desk top recorders and transcribers, at different VA Medical Centers. Lanier submitted the low quote for a complete system under each RFQ. Dictaphone complains that the VA acted improperly by requesting and obtaining waivers from the General Services Administration (GSA) from use of Dictaphone's mandatory single-award Federal Supply Schedule (FSS) contract for

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recorders and transcribers, thus enabling the VA to purchase Lanier's lower priced, complete central dictation systems which included those accessory items. We deny the protests.

Background

Both Dictaphone and Lanier hold mandatory multiple-award FSS contracts for central dictation systems (FSC group 74, part I, section "A"), but only Dictaphone holds an FSS contract for portable desk top recorders and transcribers (FSC group 74, part I, section "C").

In April 1984, the VA requested GSA to grant it a blanket waiver from use of mandatory FSS contracts for central dictation systems. The reason for this request was the VA's concern that FSS contractors were not offering sufficient trade-in allowances for used equipment, and the VA believed that it therefore was not obtaining the most advantageous prices for such systems as could be obtained through competition on a nonschedule basis. GSA refused to grant the VA's request for a blanket waiver, but allowed that it would consider granting waivers for individual procurements.

Subsequently, the VA modified its internal specification X-1710A (December 1, 1983), which governed the acquisition of central dictation systems. The modification deleted the requirement that all offered items must be on FSS contracts and now provides that waivers will be requested from GSA when the low offeror's equipment, including accessories such as portable desk top recorders and transcribers, represents non-FSS items. The VA cautioned its ordering activities that waiver requests were not to be based upon price alone, but were to include compatibility considerations.

As indicated, Lanier submitted the low quote for a complete central dictation system under each of the RFQs in issue. Since the portable desk top recorders and transcribers offered by Lanier as accessories to its system were not on an FSS contract, the ordering activity in each case requested, and obtained, a waiver from GSA from use of Dictaphone's mandatory single-award contract for those items. The ordering activities requested these waivers to assure complete system compatibility, which

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would be adversely affected if they obtained Lanier's central dictation system, but then had to purchase the accessory recorders and transcribers from Dictaphone. As one ordering activity stated in its waiver request:

"[Dictaphone's] desk top recorders would have different tracking review controls, indexing, and other electronic data incompatibilities . . . Such a condition would defeat the purpose of the system's procurement."

Protest and Analysis

Dictaphone contends that the VA acted improperly in requesting and obtaining these waivers from GSA, thereby violating the firm's mandatory single-award FSS contract with the government for portable desk top recorders and transcribers. Dictaphone believes that since it holds both a multiple-award FSS contract for central dictation systems and the single-award contract for the accessory components, it is the only firm which offers a complete system to meet the VA's requirements, and the VA therefore is obligated to purchase complete central dictation systems only from Dictaphone. Dictaphone relies upon our earlier decision in Dictaphone Corporation, B-208836, Aug. 2, 1983, 83-2 CPD ¶ 151, as support for its position. Dictaphone also asserts that its multiple-award contract in fact provides for trade-in allowances and that the VA's underlying reason for initiating the policy to request waivers is thus subject to challenge. We find no merit to the protests.

Single-award FSS contracts are made with one supplier at a stated price for delivery of the items to a defined geographic area, and such contracts identify the executive agencies that are required to use them as mandatory sources of supply. Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 8.403-1 and 8.404-1 (1984). Dictaphone's position would be well taken if the VA had been acquiring only portable desk top recorders and transcribers, since the VA, as a mandatory user, would have been required to purchase those items from Dictaphone if the items met the VA's minimum needs. See Dictaphone Corporation, B-192305, Dec. 22, 1978, 78-2 CPD ¶ 431.

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However, the procurements in issue contemplated the purchase of complete central dictation systems, and portable desk top recorders and transcribers comprised only a minor portion of the total buy in each case. The VA could satisfy its requirements only by purchasing complete systems in which the accessory recorders and transcribers were fully compatible with the central dictation system. Therefore, since Lanier's lower priced, complete systems met the VA's minimum needs, even though the firm's desk top recorders and transcribers were not on an FSS contract, we believe that the VA acted properly in requesting waivers from GSA from use of Dictaphone's single-award contract for those accessories so as to permit the acquisition of the lower priced Lanier central dictation systems.

In this regard, FAR § 8.404-3 provides that:

"(a) When an ordering office that is a mandatory user . . . determines that items available from the schedule will not meet its specific needs, but similar items from another source will, it shall submit a request for waiver . . ."

In our view, the VA acted properly in requesting the waivers from GSA, since Dictaphone's single-award items did not meet the VA's minimum needs due to their lack of compatibility with Lanier's central dictation system. (We note that Dictaphone never argues that its recorders and transcribers are in fact compatible.)

Although Dictaphone relies upon our decision in Dictaphone Corporation, B-208836, Aug. 2, 1983, 83-2 CPD ¶ 151, as support for its assertion that the fact that it holds a single-award contract for recorders and transcribers mandates the VA to purchase complete central dictation systems only from the firm, that reliance is misplaced. In that decision, we held that an award may not be made under a nonmandatory FSS contract when comparable equipment which satisfies the agency's minimum requirements is on a mandatory FSS contract held by another firm. Here, the situation is fundamentally different because the VA, while obtaining quotes from

both Lanier and Dictaphone under their mandatory multiple-award contracts for central dictation systems, was also acquiring accessory components to configure complete systems to meet its minimum needs and, of necessity, had to achieve technical compatibility. We do not believe that the VA was compelled to purchase Dictaphone's complete system merely because the firm held a single-award contract for the accessory components. Since requests for waivers are authorized by FAR § 8.404-3 when schedule items do not meet the agency's needs and waivers were granted in all cases here, Dictaphone's assertion has no legal basis.

Dictaphone also challenges the VA's underlying reason for initiating its policy of requesting waivers--the inadequate trade-in allowances for used equipment offered by FSS contractors. Dictaphone refers to its multiple-award contract for central dictation systems, which in fact provides that "Trade-in allowances will be accepted on an open market basis." Thus, the firm asserts that the VA's policy is subject to question. However, it is clear that the VA was concerned more with the monetary sufficiency of such allowances rather than whether FSS contractors offered them at all, and the granting of waivers by GSA to the VA under individual procurements indicates that the VA's concern was justified. In any event, our bid protest function generally does not encompass the policy decisions of contracting agencies, but instead addresses protest issues involving specific procurement actions, that is, whether an award or proposed award of a contract complies with statutory, regulatory, and other legal requirements. Mil-Craft Mfg., Inc., B-214015, May 7, 1984, 84-1 CPD ¶ 512. Hence, the VA's policy of requesting waivers because of its belief that trade-in allowances have been inadequate is not subject to our review.

The protests are denied.

for Seymour S. For
Comptroller General
of the United States